**ASIA COMMERCIAL FINANCE (M) BHD.**

**v.**

**KIMDEN HOUSING DEVELOPMENT SDN. BHD.**

HIGH COURT, JOHOR BAHRU
JAMES FOONG CHENG YUEN J.
[ORIGINATING SUMMONS NO. 31-628 OF 1986]
25 NOVEMBER 1992

***PRACTICE AND PROCEDURE: Application to set aside order for sale - Foreclosure proceedings - Order granted in the absence of the defendants - Whether regular - Order 83, Rules of the High Court - Whether complied with - Non-compliance with r. 2(3), 2(4), 3(3) and 3(3)(c) of O. 83 - Effect - Order 2 r. 1 - Whether applicable - Delay in application - Whether reasonable - Order 2 r. 2(1).***

***LAND LAW: Charge - Right of chargor to repay loan - Section 266, National Land Code, 1965 - Effect of non-compliance with O. 83 r. 3(3)(c) and 3(7), Rules of the High Court, 1980.***

An order for sale over property charged to the plaintiffs was made by the Court on 2 December 1986 in foreclosure proceedings instituted by the plaintiffs. It was granted in the absence of the defendants, at an adjourned hearing. Subsequent to the order for sale, the defendants were wound-up in pursuance of a winding-up petition. The private liquidator, who took over from the provisional liquidator in June 1992, applied on behalf of the defendants, *inter alia*, to set aside the order for sale on the ground of errors in the affidavits filed in support and non-compliance with the existing rules and regulations in the foreclosure application.

The main errors and acts of non-compliance alleged were as follows:

1. There was no endorsement of a notice on the outside fold of the copy of the affidavit served on the defendants informing them of the intention of the plaintiff to apply for vacant possession of the defendants' property, as required by O. 83 r. 2(3) of the Rules of the High Court.
2. There was no notice of the appointment for the adjourned hearing served on the defendants, nor of any further affidavits, as provided for under O. 83 r. 2(4) of the Rules.
3. The amounts stated by the plaintiffs' affidavits to be owing from the defendants did not correspond with the amount owing as at the date of the affidavits, as required by O. 83 r. 3(3)(c) of the Rules.
4. The plaintiffs' affidavits did not state the amount of a day's interest, as required by O. 83 r. 3(7) of the Rules.

**Held:**

The order for sale should be set aside. There was non-compliance of a number of rules that are fundamental and of essence to the whole proceeding relating to foreclosure.

**[1]** The non compliance with O. 83 r. 2(4) entitled the defendants to have the order for sale set aside as of right, *ex debito justitiae*. The right to have a judgment set aside *ex debito justitiae* relates to the judgment having been obtained irregularly, which might involve the deprivation of the rights of one party of being heard. The setting aside order need not have any terms whatsoever attached thereto, nor is the defendant required to disclose that he has a defence on merits or that there is an arguable or triable issue.

The defendants in this case were deprived of their rights to be heard for lack of knowledge when the next hearing date was. Their right to be informed of the adjourned hearing date was not affected by their absence at the first hearing. It should be the duty of the plaintiff, not the Court, to inform the defendant of the adjourned date.

**[2]** The non-compliance by the plaintiff of the other rules of the High Court, though an irregularity as stated in O. 2 r. 1 of the Rules, was a breach that was so fundamental as to entitle the defendants to set aside the judgment order obtained against them.

The non-compliance of O. 83 r. 3(3)(c) and 83 r. 3(7) of the Rules, by depriving the defendants of the knowledge of the exact amount outstanding under the charge, deprived them of the opportunity for repayment of the loan, before their property, which was only a security, was taken from them. This opportunity is provided by s. 266 of the National Land Code, and extends to 'any time before the conclusion of the sale' by public auction.

**[3]** The application to set aside was with merits and in compliance with the Rules of the

High Court. There was no merit in the plaintiff's argument regarding the 6 years' delay in the bringing of the application to set aside. Order 2 r. 2(1) of the Rules clearly provides for reasonable time in making an application 'after becoming aware of the irregularity'. The defendants' private liquidator was only recently appointed, and became aware of the irregularities only after his appointment.

*[Defendants' application allowed with costs]*

**Cases referred to:**
*White v. Weston [1968] 2 QB 647* ***(foll)***
*Malayan Banking Bhd. lwn. Dagang Bina Sdn. Bhd. [1991] 3 CLJ 1739* ***(foll)***

**Legislation referred to:**
National Land Code 1965, ss. 256, 266
Rules of the High Court 1980, O. 2 r. 2(1), O. 83 r. 2(3) & (4), r. 3(3) & (7)

*For the plaintiffs - A. Navamani; M/s. T.S. Chong & Co.*
*For the defendants - David Hoh; M/s. Lim & Hoh*

**JUDGMENT**

**James Foong Cheng Yuen J:**
This is an application by the defendants, by way of summons in chambers (Enclosure 64) for, *inter alia*, an order to set aside an order for sale granted by this Court on 2 December 1986.

The said order for sale was granted by Mr. Justice Shanker in the absence of the defendants, though duly served with an originating summons in a foreclosure proceeding instituted by the plaintiffs (Enclosure 1).

Subsequent to the said order for sale, the defendants were wound-up in pursuance to a winding-up petition. Its affairs were initially taken over by the Official Assignee appointed as the provisional liquidator. Only on 1 June 1992 the private liquidator, who now files this application on behalf of the defendants, took over the affairs of the defendants from the provisional liquidator.

After taking over its affairs, the private liquidator of the defendants realised that there are errors and non-compliance with existing rules and regulations in the plaintiffs' foreclosure application (Enclosure 1) and, their affidavits filed in support. Due mainly to these reasons the defendants are seeking to set aside the said order for sale.

The main errors and non-compliance are as follows:

1. *Non-compliance with Order 83 r. 2(3) of the Rules of the High Court*

   As submitted by the defendants' Counsel, O. 83 of the High Court Rules is the governing rule for foreclosure actions leading to an order for sale of charge properties as stated in s. 256 of the National Land Code and its subsequent related sections.

   Order 83 r. 2(3) states as follows:

   > Where the plaintiff claims delivery of possession there must be endorsed on the outside fold of the copy of the affidavit served on the defendants a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendants to deliver up to the plaintiff possession of the charged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends to apply for at the hearing.

   According to the defendants' Counsel, the plaintiffs' affidavit (Enclosure 2) filed in support of their application for foreclosure proceeding of the defendants' property, bears no endorsement on the outside fold about a claim for vacant possession. However, in the plaintiff's originating summons for foreclosure (Enclosure 1) there is such a claim for vacant possession. As such the plaintiffs have failed to comply with O. 83 r. 2(3) of the Rules of the High Court.

2. *Non-compliance with Order 83 r. 2(4) of the Rules of the High Court:*

   Order 83 r. 2(4) states as follows:

   > Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.

   According to the defendants' Counsel, the first hearing date of the originating summons for foreclosure was made known to the defendants. However, on the said date, the hearing of the plaintiffs' application was postponed and a subsequent date

(i.e.) 2 December 1986 was fixed by the Court. The plaintiffs failed to inform the defendants of this new hearing date by failing to serve a notice of appointment as provided for under the aforesaid rules.

Further, the plaintiffs also failed to serve any subsequent further affidavits on the defendants before the hearing of the next adjourned date.

3. *Non-compliance with Order 83 r. 3(3) and O. 83 r. 3(3)(c):*

Order 83 r. 3(3) states as follows:

> Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of -
>
> (a) the amount of the advance;
> (b) the amount of the repayments;
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
> (d) the amount remaining due under the charge.

According to the defendants' Counsel there are 2 further affidavits filed by the plaintiffs (Enclosure 8 and 10 respectively) besides the first affidavit (Enclosure 2) of the plaintiffs filed in support of their foreclosure application.

In the plaintiffs' first affidavit (Enclosure 2) the amount stated to be owing was as at 25 April 1986 while this said affidavit was affirmed on 30 June 1986. This is in contravention to O. 83 r. 3(3)(c) above where, the amount owing should be as at date of issue of the originating summons for foreclosure which was 6 July 1986 and the date of the said affidavit which was 30 June 1986.

Proceeding further, as submitted by the defendants' Counsel, the subsequent affidavit (Enclosure 8) was affirmed on 19 November 1986. However, in para 3 of this affidavit the amount stated due and owing was calculated as at 24 November 1986.

Again, in the affidavit (Enclosure 10) which was affirmed on 25 November 1986, the sum stated therein as due and owing by the defendants was RM1,565,884.66, calculated as at 1 December 1986.

All the amount stated never corresponded with the requirement of O. 83 r. 3(3)(c) which requires the amount owing to be as at the date of the said affidavits.

*Order 83 r. 3(7)*

This rule states as follows:

> Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

In all the plaintiffs three affidavits filed in support of the foreclosure proceeding, it is never stated therein "the amount of a day's interest".

Based on the aforesaid, the defendants' Counsel argued that there are irregularities which, would entitle the defendants to set aside the order for sale as of right; *'ex debito justitiae'*.

The plaintiff's Counsel though admitting that there were irregularities as mentioned said that they could be cured under O. 2 of the Rules of the High Court. Further, the plaintiff's Counsel alleged that the defendants did not make this application to set aside within reasonable time. From the date of the said order for sale todate of this application to set aside, a lapse of approximately 6 years has passed.

After careful consideration of the respective submissions by both parties, I find that the right to set aside a judgment *ex debito justitiae* relates to judgments obtained "irregularly". Such irregularity often solely affects the deprivation of the rights of one party of being heard, as in cases of non service of the relevant summons on the defendants. Under these circumstances the defendants are entitled as of right to have it set aside with no terms whatsoever attached thereto. (See the case of *White v. Weston* [1968] 2 QB 647 where the Court of Appeal rejected an imposition by the lower Court of "costs in cause" on the setting aside order). Further, in an application to set aside a judgment *ex debito justitiae,* the applicant is not required to disclose that he has a defence on merits or that, there is an arguable or triable issue.

In this respect, I shall refer to the assertion by the defendants of the non-compliance of O. 83 r. 2(4) by the plaintiffs. Subsequent to the postponement of the first hearing date by the Court, the plaintiffs failed to issue and serve on the defendants a notice of the appointment for

the adjourned hearing. Such being the case, I find that the defendants were deprived of their rights to be heard for lack of knowledge as to when the next hearing date was. Though the defendants failed to attend at the first hearing date, O. 83 r. 2(4) of the Rules of the High Court specifically insisted that the defendants must be made known of the adjourned hearing date thereby granting them an opportunity to be heard. Failure to comply with this would amount to the deprivation of a party's fundamental right to be heard and, as such, would entail an order to set aside the judgment *ex debitio justitae.*

This Court cannot accept the argument of plaintiffs' Counsel that, it should be the duty of the Court to inform the defendants of the adjourned date. Order 83 r. 2(4) of the Rules of the High Court imposes no such duty upon the Court to inform the defendants of the adjourned date. In fact, this particular Rule itself clearly and explicitly states that it should be the duty of the plaintiffs to do so by the use of the following words:

> the plaintiff must serve notice of appointment for the adjourned hearing.

In respect of the non-compliance by the plaintiffs of the other rules of the High Court, I find that breach of these rules, though an irregularity as stated in O. 2 r. 1 of the Rules of the High Court, is so fundamental as to entitle the defendants to set aside the said judgment order obtained against them.

The non-compliance with O. 83 r. 3(3)(c) and O. 83 r. 3(7) of the Rules of the High Court in this case, deprives the defendants of the knowledge of the exact amount outstanding and interest due under the charge. This is fundamental as the charge of the defendants' property to the plaintiffs is related to loans granted to the defendants. The defendants must be offered every opportunity to repay the said loan before his property, which is only a security, is taken from him for good. This opportunity for repayment, as seen in s. 266 of the National Land Code, extends to "any time before the conclusion of the sale" by public auction subsequent to an order for sale by the Court. The non disclosure to the defendants of the exact amount and interest due at relevant dates, are failures to comply with statutory requirements that are so serious as to render an order so made therefrom to be set aside.

I am in full agreement with Mr. Justice Razak's decision in *Malayan Banking Bhd. lwn. Dagang Bina Sdn. Bhd.* [1991] 3 CLJ 1739 where an order for sale in a foreclosure proceeding was not allowed due to the failure of the plaintiff bank in complying with O. 83 r. 3(3) of the Rules of the High Court, to disclose the amount of any interest or instalment in arrears at the date of issue of their originating summons and at the date of their affidavit.

In this case before me, not only was there non-compliance of one rule but, so many other rules that are so fundamental and of essence to the whole proceeding relating to foreclosure.

As to the question of delay in bringing this application to set aside, I find no merit in the plaintiffs' argument on this point. Order 2 r. 2(1) of the Rules of the High Court clearly provides for reasonable time in bringing this application "after becoming aware of the irregularity". I find that the defendants' private liquidator was only recently appointed and, I am satisfied from his affidavit that he only became aware of these irregularities after his appointment. Such being the case, this application for setting aside though brought some 6 years later is with merit and in compliance with the Rules of the High Court.

I therefore allow the defendants' application to set aside the order for sale dated 2 December 1986 with costs.